

**Guaranteeing the Security of the State  
and the Individual Through Codifying  
A Right of Humanitarian Intervention**

Aidan Hehir

*Department of Politics and Public Administration  
University of Limerick*

No. 10, 2005.

Department of Politics and Public Administration  
University of Limerick  
Limerick, Ireland

[www.politics.ul.ie](http://www.politics.ul.ie)

Copyright © Aidan Hehir 2005.

ISBN 1874653860

The views expressed in this work are those of the author, and do not necessarily represent the views of the Department of Politics and Public Administration.

---

**Limerick Papers in Politics and Public Administration:**

1. C. Maria Keet, *Towards a resolution of terrorism using game theory. Coalitions, negotiations and audience costs*, 2003.
2. Lucian M. Ashworth, *Forget Aristotle: Alexander the Great and the military origins of modern political organisation*, 2003.
3. Neil Robinson, *Communist and post-communist states, and path dependent political economy*, 2003.
4. Alex Warleigh, *Intra-disciplinarity and political study of regional integration: European Union studies, 'new regionalism' and democracy*, 2003.
5. Maura Adshead and Michelle Millar, *Ireland as Catholic corporatist state: a historical institutional analysis of healthcare in Ireland*, 2003.
6. Owen Worth, *Making sense of globalisation: a neo-Gramscian analysis of the practices of neo-liberalism*, 2003.
7. Neil Robinson, *Putin, the 'normalization' of Russian politics and Europe*, 2005.
8. Lucian M. Ashworth, *Where are the Idealists in inter-war International Relations?* 2005.
9. Barry J. Ryan, *Deliberating community policing in Serbia*, 2005.
10. Aidan Hehir, *Guaranteeing the security of the state and the individual through codifying A right of humanitarian intervention*, 2005.

## THE RISE OF HUMAN RIGHTS

Despite the dissolution of the Soviet Union, security has remained a paramount concern of Western states in the post-Cold War era. The nature of the current threats may have changed but the need to guard against external aggression remains. Contemporary threats to security manifest most frequently as the consequences of intra-state conflict and international terrorism. Both have human rather than state interest at their root and ultimately derive from the desire of certain groups to subvert existing state systems and borders. There is a clear causal link between the abuse, or perceived abuse, of a group's human rights and the desire of this group to secede from their oppressive host state via the recourse to terrorism or civil war, as evidenced by the IRA and ETA.

The rights and security of the individual have become primary issues in international relations discourse in the post-Cold War era. According to Antonio Cassese, 'It is a truism that today human rights are no longer of exclusive concern to the particular state where they may be infringed. Human rights are increasingly becoming the main concern of the world community as a whole. There is a widespread sense that they cannot, and should not, be trampled upon with impunity in any part of the world'.(1999: 26) Rights orientated rhetoric has sought to place the rights of the individual above the rights of the state, specifically the tenets of sovereignty, and has at its core the principle of humanitarian intervention.(Robertson, 2002, 433). Intervention necessarily challenges the inviolability of state sovereignty and, therefore, increasing the security of the individual seems to be to the detriment of the security of the state. Furthermore, interventions for ostensibly humanitarian principles in the post-Cold War era have been undertaken primarily by the more powerful Western states, or coalitions thereof, and NATO in particular. The rise in Western rhetoric regarding 'moral imperatives' or 'duties' to intervene globally to protect certain values has alarmed less powerful states that view this revised dispensation as a means to facilitate a new era of colonialism. As Lloyd notes, 'Opposition to the war in Kosovo has come most vociferously from those states that see universal values not as an expression of human freedom or rights, but as a threat. And now they see them as an even greater threat because, for the first time, values have been used as the explicit basis for waging war'(1999, 14). The interventions in Afghanistan and Iraq, despite the existence of more obvious impulses, were legitimised on humanitarian imperatives and further suggested that coalitions built around, or exclusively comprising, Western powers were posed to undertake a new era of aggressive expansionism under the guise of nation building and humanitarianism. The lack of direct intervention in Israel, Chechnya and North Korea, similarly points to a selective adherence to 'universal' rights and norms based on geopolitical agendas. The explicit call for a new era of colonisation made by key foreign policy strategists, such as Robert Cooper (2002), and Michael Glennon's assertion that, 'The West's new rules of thumb on intervention accord less deference to the old idea of sovereign equality...The new posture recognises the hollowness of this concept, accepting that all states are not in fact the same in their power, wealth, or commitment to human rights'(1999, 4) has generated disquiet as to the emerging asymmetrical value system. Chandler, indicative of those academics wary of the new dispensation, suggests that, '...the sovereignty of some states...is to be limited, that of others – the NATO powers – is to be increased under the new order: they are to be given the right to intervene at will. It is, in other words, not sovereignty itself but

sovereign equality...which is being targeted by the new interventionists'(2000; 55). Less powerful states thus perceive the West's determination to increase its direct involvement globally, ostensibly to maintain human rights standards, as a threat to their security.

The most immediate potential solution to the conflict between the need to protect human rights and the need to safeguard against the abuse of this principal as a means to facilitate the execution of sectional policy, is to codify means by which such interventions could take place and transfer decision making with respect to halting human rights violations to an international body. This would insure that human rights violations would be addressed, but by an actor with legal legitimacy. Yet, codification would necessarily impact on the ability of Western states to carry out their foreign policy objectives and institute a legal proscription on certain behaviour. Whereas today, powerful Western states can determine that a situation necessitates intervention, codification would transfer these decision-making responsibilities to a transnational organisation. In addition, such an organisation could determine that action should be taken in certain circumstances that conflict with a states foreign policy agenda. Therefore, why should powerful Western states support initiatives to institute a legal right of intervention? It is the contention of this paper that codification of a right of humanitarian intervention would serve to shield these states from instability generated by escalating intra-state conflicts and eliminate a major cause of international terrorism.

## **THE CURRENT STATUS OF HUMANITARIAN INTERVENTION**

For the purposes of this examination I define a humanitarian intervention as when a state, or group of states, undertakes an unsolicited military intervention in the internal affairs of a sovereign state with the expressed purpose of achieving exclusively humanitarian goals. Thus, this intervention is opposed by the state being intervened into, though not necessarily by all factions within the state.

In the post-Cold War era intra-state conflicts have become a great source of violence and instability and these situations have challenged the international community's ability to maintain peace and protect human rights within sovereign states. The rise in the recognition of the rights of the individual and the removal of the constraints imposed by bi-polarity, compelled the emergence of a conviction among certain elements of the liberal international relations perspective to argue for a proactive Western approach to global human rights (Robertson, 2002; Ignatieff, 2000). Thus, the status of humanitarian intervention has become an increasingly important issue in international relations discourse. NATO's intervention in Kosovo in 1999 'brought the controversy to its most intense head' (International Commission on Intervention and State Sovereignty, 2001; VII) and highlighted the gulf between contemporary legal doctrine and evolving conceptions of human rights and ethical state behaviour. The conclusion reached by the Independent International Commission on Kosovo is succinctly illustrative of the central problem; 'The Commission concludes that the NATO military intervention was illegal but legitimate' (Independent International Commission on Kosovo, 2000; 4).

International law enshrines the sovereign inviolability of the state. The sovereign status of the state has evolved from the principles of the Treaty of Westphalia to the explicit provisions codifying sovereignty in the UN Charter. The Charter's codification of the sovereign equality of all its members, as detailed in

Article 2.1, 2.4 and 2.7, served as a clarification of the previous selective adherence to sovereignty and, according to Chandler, the Charter, ‘...marked, it seemed, the end of the Westphalian system of legitimating great power domination through the use of force’ (2000; 59).

Article 2.4 proscribes all UN members from the use of force in their international affairs and Articles 53 and 64 of the 1969 Vienna Convention on the Law of Treaties states that this particular provision is part of *jus cogens*, and is therefore accepted by the international community as a principle from which no derogation is permitted. The use of force by states, regardless of the motivation, is explicitly proscribed except under two circumstances, namely self-defence, as defined under Article 51, which the International Court of Justice (ICJ) ruled in the 1986 case of *The US Vs. Nicaragua* should be understood restrictively (Guilcherd, 1999; 21), and secondly, to maintain or restore international peace and security as defined under Chapter VII.

Under Article 24 of the Charter member states acknowledge that the Security Council has ‘...primary responsibility for the maintenance of international peace and security’. The one possible derogation from this rule is the 1950 General Assembly Resolution 377, entitled ‘Uniting for Peace’. This resolution theoretically enables the General Assembly to act when the Security Council is unable to unanimously sanction action when there is a threat to international peace and stability. The Resolution has been used on ten occasions and was first used during the Suez Canal crises in 1956. However, the lack of effectiveness of this principle was evidenced later that year when the General Assembly used this provision to demand that the Soviet Union cease its intervention in Hungary to no effect. A two-thirds vote in favour of action would, according to the International Commission on Intervention and State Sovereignty (ICISS), ‘...provide a high degree of legitimacy for an intervention which subsequently took place, and encourage the Security Council to rethink its position’ (2000; 53). A ‘high degree of legitimacy’ clearly does not constitute an explicit legal endorsement and the Danish Institute of International Affairs (DIIA) found that the Uniting for Peace resolution ‘Has lost much of its importance...[and] is no legal basis for the authorisation of humanitarian intervention’ (1999; 61).

In its seminal ruling in the Corfu Channel Case (1949) the ICJ declared that it could

only regard the alleged right of [humanitarian] intervention as the manifestation of a policy of force, such as has, in the past, given rise to most serious abuses and as such cannot, whatever be the present defect in international organisation, find a place in international law. Intervention... would be reserved for the most powerful states and might easily lead to perverting the administration of international justice itself (Danish Institute of International Affairs, 1999; 86).

In 1986 the UK Foreign Office, in its appraisal of the legal status of humanitarian intervention, stated that

the overwhelming majority of contemporary legal opinion comes down against the existence of a right of humanitarian intervention for three main reasons: first, the UN Charter and the corpus of modern international law do not seem specifically to incorporate such a right; secondly, state practice in the past two centuries, and especially since

1945, at best provides only a handful of genuine cases of humanitarian intervention, and on most assessments, none at all; and finally on prudential grounds, that the scope of abusing such a right argues strongly against its creation' (Chandler, 2002; 140-141).

Thus, under international law there is no legal provision that explicitly sanctions the use of force to uphold human rights violations and states are explicitly forbidden from unilaterally determining when and where to intervene on humanitarian grounds.

Chapter VII of the UN Charter, relating to a threat to international peace and security, is one possible legal justification for intervention. However, as the DIIA notes

It was hardly the intention of the framers of the Charter that internal conflicts and human rights violations should be regarded as a threat to international peace. There is no evidence that they might have envisaged a competence for the Security Council under Chapter VII to take action to cope with situations of humanitarian emergency within a state resulting from civil war or systematic repression' (1999; 62).

Nonetheless, during the 1990's the definition of a threat to international peace and security was stretched to facilitate interventions into situations that, though grave, could not reasonably be said to constitute such a threat. The UN approved intervention in Haiti in 1994, to oust the military from office and restore democracy, was premised on the situation constituting a threat of this magnitude. The declaration in this instance widened the definition of a threat to international peace and stability to incorporate non-democratic regimes. In practice, as the ongoing situation in Myanmar attested, the existence of non-democratic regimes, and benefactors of military coups, was not seen in every instance to present this grave threat. In addition, in keeping with other declarations of a threat to international peace and stability during the 1990's, this Security Council ruling was officially considered an exception. Resolution 940 recognised '...the unique character' of the situation and stated that its 'extraordinary nature...[required] an exceptional response'. Similarly, the sanctioning of action on the grounds that there was a threat to international peace in Somalia in 1992 was premised on it being '...an exceptional response' and the sanctioning of action in Rwanda through Resolution 929 in 1994 was '...a unique case'. As the DIIA notes, 'This approach reveals unwillingness on the part of the Security Council to set precedents for humanitarian intervention in internal conflicts'(1999; 71). The provisions of Chapter VII of the Charter do enable the Security Council to sanction military intervention in intra-state conflicts but not explicitly for humanitarian reasons. While the term 'threat to international peace and stability' may be malleable, and has been questionably broadened to accommodate certain situations, the inconsistency of application, the lack of explicit legal authorisation and the reluctance to set a precedent when used, mitigates against the provisions of Chapter VII constituting a codified legal legitimacy for humanitarian intervention.

Catherine Guilcherd noted that during NATO's campaign against Yugoslavia, 'The argument [for intervention] was obviously more political than legal'(1999; 19). However, certain elements within NATO's hierarchy did assert a legal justification for the intervention. UK Defence Minister George Robertson maintained, 'We are in no doubt that NATO is acting within international law. Our legal justification rests upon the accepted principle that force may be used in extreme circumstances to avert

a humanitarian catastrophe'(Chandler, 2002; 141). While suggesting that this principle is 'accepted' is a political statement and not factually correct, humanitarian intervention is certainly not considered illegal by everyone. There are essentially two legal justifications that have been articulated regarding the legality of humanitarian intervention. Firstly, there is the 'link theory' as proffered by Richard Lillich (1967). This suggests that, under Article 1.1 of the Charter, UN member states have a responsibility to maintain international peace and security and that when the Security Council is unable to carry out its assigned duties in this respect, the onus is on member states to act and the prohibition on the use of force as outlined in Article 2.4 is suspended. In its assessment of the merits of the link theory, the DIIA identified three flaws. Firstly, there is no explicit basis for this rationale outlined in the Charter. Although Article 24 states that the Security Council has primary, rather than exclusive, responsibility for the maintenance of international peace and security, according to the DIIA, '[This] refers to a subsidiary responsibility of other organs of the UN, notably the General Assembly, but not of the Members states' (1999; 82). Secondly, it is not legally sound to assert that the Charter must be suspended when the Security Council fails to act. There is no legal basis for this assertion. Thirdly, the prohibition on the use of force between states is a tenet of customary international law and has evolved independently of the UN Charter and therefore '...can hardly be conditioned upon the effectiveness of collective security under Chapter VII' (1999; 82).

The second suggested justification relates to the customary nature of international law. The *Paquete Habana Case* (1900) established that in addition to codified doctrines, treaties and court judgements, international law is based on established customary behaviour of states and this principle is codified in Article 38 of the Statute of the ICJ. Thus, as the DIIA notes, '...the only possible legal justification for humanitarian intervention without Security Council mandate is the assumption that the practice of states after 1945 has established a right of humanitarian intervention as part of customary international law'(1999; 88). However, Arendt and Beck analysed interventions during the Cold War period and concluded, '...between 1945 and 1990 there were no examples of a genuinely humanitarian intervention' and in addition, during this period there was 'no unambiguous case of state reliance on the right of humanitarian intervention' (1993; 137). As noted earlier, the UK Foreign Office found in 1986 that no customary norm of humanitarian intervention had evolved and the ICISS similarly reported, '...the many examples of intervention in actual state practice throughout the 20<sup>th</sup> century did not lead to an abandonment of the norm of non-intervention' (2000; 12). Furthermore, according to Holbrook, 'Those who argue that international law has evolved over the last decade to establish or revive a right of humanitarian intervention are reneging on the principle that international legal norms can only be formed where there is a consensus' (2002; 143). While North American and European states may assert, at least periodically, that such a principle should be taken as having entered customary international law, the fact that this is opposed by China and Russia, to look only within the Security Council, suggests that far from there being agreement as to the evolution of a principle, there is active hostility to the development of such a legal norm.

## **CONTEMPORARY THREATS TO STATE SECURITY**

In 2000 of the 36 wars recorded only the conflict between Ethiopia and Eritrea was inter-state in nature (Czempiel, 2004; 80). The ongoing 'Minorities at Risk Project' found that of the one hundred and ninety states in existence, one hundred and twenty had politically significant minorities and that in Eurasia and Africa, thirty countries are '...at serious risk of violent conflict and instability for the foreseeable future' (Feste, 2003; 9). These findings led Feste to argue that 'The real political threat to stability lies in the structural detachment of populations from their traditional dependency on governments and the attendant increases in various kinds of non-governmental or private initiatives that can prove disruptive to social cohesion' (Ibid, 11). In essence, international stability is threatened by the consequences of intra-state instability. The US National Security Strategy recognised that 'America is now threatened less by conquering states than we are by failing ones' (2002; 11).

The cycle of violence between separatists and state forces necessarily results in loss of civilian life and attendant violations of human rights. Intra-state conflicts have the potential to escalate rapidly and engulf neighbours turning an internal crisis into a regional conflagration, as evidenced by the ongoing unrest in the Democratic Republic of Congo. The increased economic interdependence of states has meant that intra-state conflicts that provoke regional crises can impact on Western foreign investment and domestic markets and generate international economic instability in addition to political and social disruption. The conflict prevention initiatives in Indonesia and Macedonia had at their core this understanding and President Clinton's warning on the eve of the initiation of air strikes against Yugoslavia 'Let a fire burn here and the flames will spread' (Broder, 1999; A15) has international applicability.

The second major contemporary threat to international security is terrorism. While terrorism is not a new threat, its magnitude has increased sharply since September 11<sup>th</sup>. The threat posed by international terrorism has risen in the last decade as terrorist groups have taken advantage of technological innovations and pursued their objectives outside the borders of their host state. The increased prominence of international terrorism in Western state security agendas and political rhetoric has generated an increased focus on the causes of terrorism and its negative implications for state security.

Both terrorism and intra-state conflicts can loosely be attributed to the same source, namely the disjuncture between citizens and the state, or between citizens and political systems. Efforts made to date to tackle these threats have taken two forms, preventative and confrontational. The preventative approach seeks to tackle the root causes via aid and democratisation initiatives while the confrontational approach seeks to tackle the terrorist organisations directly by military means and the use of coercion. It is my contention that, while there are merits to both approaches, without codifying a right of humanitarian intervention, these twin threats will remain and, in certain circumstances, increase.

## **THE NEED TO CODIFY**

The current lack of codified means by which states, coalitions of states or the international community as a whole can intervene to prevent the serious violation of human rights contributes to the escalation of intra-state conflicts, adds to the attraction



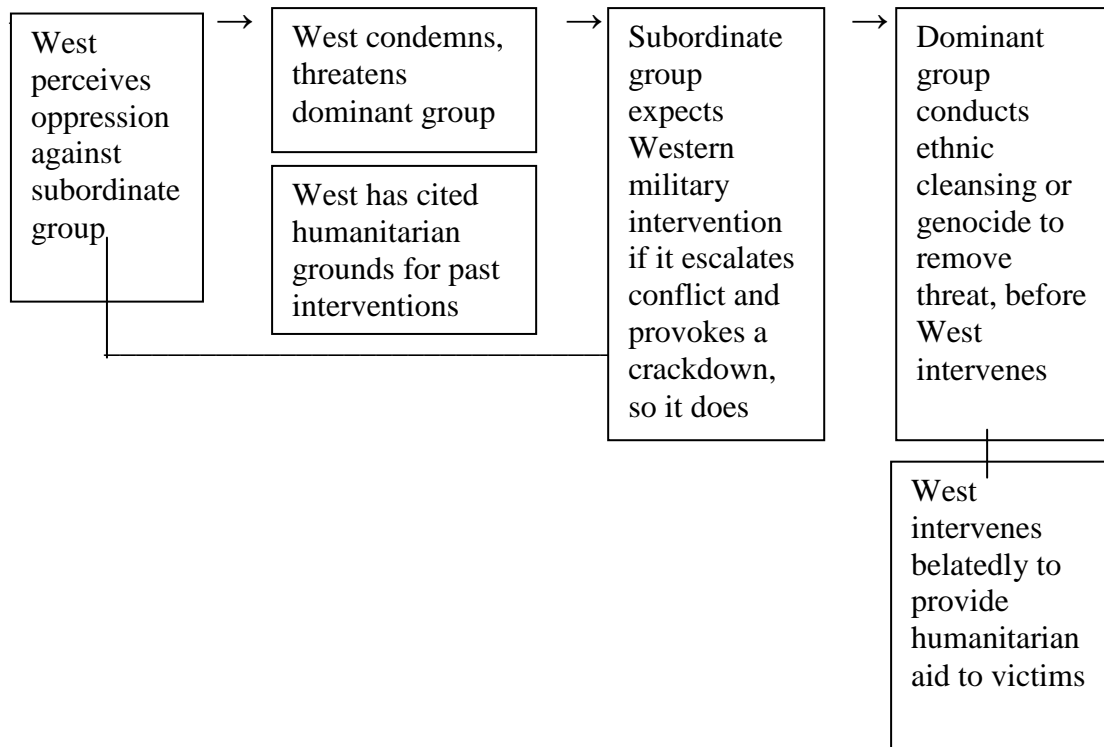
of terrorist organisations and, ultimately, negatively impacts on the security of Western states. According to the ICISS ‘...the issue of international intervention for human protection is a clear and compelling example of concerted action urgently being needed to bring international norms and institutions in line with international needs and expectations’ (2000; 3). This urgent need should not be seen purely in terms of the protection of human rights but as also necessary to protect states from the two most pressing threats to their security.

Post-Cold War intra-state conflicts have tended to involve a conflict between a group, often an ethnic group, seeking to secede and a central administration aiming to maintain the territorial integrity of the state, such as Chechnya, Kosovo and Aceh. The recourse to violence in the face of state implacability and oppression is common and it is these situations that threaten stability beyond the borders of the state. The lack of a clear legal means by which secessionists can appeal for intervention to counter the abuse of human rights by the host state is directly responsible for what I describe as the ‘escalation imperative’. Without recourse to existing legal channels governing intervention, secessionists may conclude that the only way to focus international attention on their plight is by escalating the conflict and generating those features of conflicts that have traditionally provoked international attention, often through the media or NGO’s. Thus, the rationale could be crudely described as ‘the greater the tragedy the more likely the response’. The most apparent contemporary example of this phenomenon is the KLA and the conflict in Kosovo.

While undeniably suffering under Milošević’s regime, the recourse to war by the KLA was initially unpopular amongst the Kosovar Albanians who overwhelmingly supported the pacifism of Rugova and his LDK party. The rise in support for the KLA derived from the growth in frustration at the lack of tangible results from Rugova’s tactics, in particular the ignoring of Kosovo in the Dayton Accords. According to Hodge, ‘In effect Dayton told autonomists in Kosovo that the metal in Kosovo was not hot enough to bring about political change. The KLA decided to make it glow’ (2000; 26). Thus, the KLA adopted a strategy, according to Gow, of ‘...armed engagement designed to provoke atrocities’ (2003; 256) that would generate international attention. The KLA could never hope to defeat the Yugoslav army and thus gambled on gaining the support of NATO. The gamble worked and NATO intervened on the basis that they had a ‘moral duty’ to do so (Solano, 1999). However, this gamble is very risky, both for the architects of the strategy and those powers whose support is coveted.

Blainey describes the rationale that has prompted separatists to escalate the scale of their conflict as ‘optimistic miscalculation’ (Kuperman, 2003; 57). Kuperman writes that, ‘...in the post-Cold War era, a main source of such optimistic miscalculation has been the expectation by subordinate groups that the ‘international community’ will intervene to protect them on humanitarian grounds if their challenge to authority provokes retaliatory violence’ (2003; 57). Kuperman’s diagram representing the cycle of events typical of certain instances of genocide is illustrative of the dangers inherent in the current unregulated system of intervention and his findings reflect a problem not so much inherent in the principle of intervention but in the current *ad hoc* nature of intervention:

Table 1. ‘How the West Inadvertently Causes Genocide and Ethnic Cleansing’  
(Kuperman, 2003; 57)



The central problem is that the subordinate group believes its only hope of achieving its goals is to attract the attention of a Western power through the engineering of a humanitarian catastrophe. This presupposes that it is the West alone that determines when and how to undertake a humanitarian intervention, which is essentially the case under the current unregulated structure. Where separatists’ struggles have been unable to provoke an intervention, most notably in Turkey, the consequences are increased oppression and the increased polarisation of the groups in dispute. Escalation necessarily increases the likelihood of increased violence, which makes the resolution of the underlying conflict more difficult and simultaneously increases the chances of the conflict spreading beyond the borders of the state.

The recourse to terrorism is a consequence of both a policy and a fear that ultimately derive from individual’s conception of their own security. According to Hertz, an important feature of the sustained popularity of the state model is the fact that, ‘Throughout history that unit which affords protection and security to human beings has tended to become the basic political unit’ (1957; 473). The state has been able to provide this necessary protection and security through the shield of sovereignty. The state, as it now exists, owes its position of primacy in the international system to the Westphalian model of sovereignty and its explicit codification under the UN Charter. Bloom’s analysis of the rationale for patriotism in the individual asserted that

In order to achieve psychological security every individual possesses an inherent drive to internalise - to identify with - the behaviour, mores and attitudes of significant figures in his/her social environment; i.e. people seek identity...every human being has an inherent drive to enhance and

protect the identification he/she has made; i.e. people actively seek to enhance and protect identity' (Bloom, 1990; 23).

Individuals, therefore, will align themselves with that group or institution that will provide them with the greatest sense of security. The tenets of sovereignty encouraged citizens of militarily weak states to entrust their allegiances to that state because of the security afforded to all states under international law and the customary practice of states. As such, the security of the state could be guaranteed by a legal provision rather than by military might, though alliances and treaties were also signed to enhance security. The sovereign individual, therefore, gave up elements of his/her sovereignty to the sovereign state as a means to allow the state both the internal sovereignty it needed to function as a political entity and also to enable the preservation of the state in the international arena.

In 'The Anarchical Society' Bull identified two categories of sovereignty, namely internal and external (1977; 8). Internal sovereignty refers to the authority of the state being accepted without question by its citizens, which, he argues, was in the process of being widely established before Westphalia. Bull maintains it was the establishment of external sovereignty that was Treaty's most important legacy. The recognition of the external sovereignty of states meant that no national or international entity could legitimately interfere in the activities of another state. The state after 1648 came to embody both the previous secular and spiritual authority structures in Europe and thereafter had this status laid down in international law. The Treaty imbued the state with historically unprecedented power and as Weiss and Chopra write, '...it transferred to nation-states the special godlike features of church authority' (1995; 97). The further codification of the principle in the UN Charter served as the final legitimisation of the state model as guarantor of security. Internal sovereignty, identified by Bull as the capacity to rule, necessitates the citizenry's acceptance, be it conscious or passive, of the government's authority (1977, 8). The willingness of the citizenry to accede to the states internal sovereignty is, therefore, dependant on the state's ability to meet their basic security requirements. As Kedourie writes, 'The cohesion of the state and loyalty to it, depend on its capacity to ensure the welfare of the individual, and in him, love of the fatherland is a function of benefits received' (1971; 12).

The present *ad hoc* interventionist policy adopted and advocated by certain Western statesmen significantly weakens the status of sovereignty. In its findings the ICISS noted, '...even in states where there was the strongest opposition to infringements on sovereignty, there was a general acceptance that there must be limited exceptions to the non-intervention rule for certain kinds of emergencies' (2000; 31). Thus, it is not necessarily intervention *per se* that is opposed, but the unregulated, and inherently sectional, manner in which it has been pursued in the post-Cold War era. According to Pangle and Ahrensdoerf 'The nation-state is today weaker than it has been since 1815, and arguably weaker than it has ever been since its first form was established in the Treaty of Westphalia in 1648' (1999; 3). The selective abandonment of the tenets of sovereignty thus impacts on citizens' perceptions of the state itself. If the state is unable to provide the individual with the necessary sense of security from external threat, through the recognition of its external sovereignty, then citizens will align themselves with other organisations that purport to do so, such as the KLA or AL Qaeda. There is, therefore, a causal link between the willingness of citizens from Somalia, Afghanistan and Sudan to join Al Qaeda and the fact that these states have lost their sovereign legitimacy and internal

cohesion. One way terrorist groups gain support is through the decline in the status of state sovereignty and many, most particularly Al Qaeda, have readily adopted the mantle of defender against external interference and neo-colonialism. Therefore, Western assumptions that human rights are best upheld by recourse to its own military might and moral clarity, rather than legal doctrine, have diminished the status of sovereignty and precipitated a shift in allegiances from the state to sub or trans-state terrorist groups.

The absence of codification and the belief in the ability of the West to regulate human rights and intervention policy can therefore be seen to have contributed to, though certainly not singularly caused, the escalation of the two most manifest threats to state security in the West. Codification of a right of humanitarian intervention would remove these contributing factors in the following ways.

The absence of a clear means by which groups claiming to be suffering oppression can appeal for external assistance has created the escalation imperative and its attendant risks. Codification of a mechanism by which an international organisation, most suitably the UN, could arbitrate and ultimately determine that intervention is warranted would eliminate the need for escalation. The international body charged with determining the seriousness of the situation, much like domestic judicial institutions, would not be compelled to act only in conscious shocking situations. Rather, any instance of human rights violations by an implacable state would be impartially addressed without a necessary consideration of scale. Provocation, of the type employed by the KLA, would potentially lessen the chances of intervention, as this would be judged as an unwarranted contributing factor to the crisis at hand. The proposed solution to such a situation may therefore be to tackle the insurgents rather than intervene on their behalf.

Codification of a right of intervention would impact on the status of sovereignty but would not necessarily negate it entirely. If the ICISS findings are correct then there is evidence to suggest that absolute sovereignty is not considered sacrosanct by states. Sovereignty has periodically been ignored by states pursuing their geopolitical aims yet, these instances represented situations determined by sectional agendas rather than the expansive liberal ideology of 'a new kind of imperialism' (Cooper, 2002; 28) which aims to establish a principle of interference which necessarily weakens the status of sovereignty.

Article 2.7 of the UN Charter suggests, 'Nothing in the present Charter shall authorise the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state'. The definition of what constitutes domestic jurisdiction, however, has changed since the inception of the Charter. The evolutionary projection of international law since Nuremberg, in both codified and customary terms, has been to decree that there are certain acts that a state cannot commit against its own citizens. Paragraph four of The Vienna Declaration and Programme of Action adopted by all UN members in 1993 decrees, '...the promotion and protection of all human rights is a legitimate concern of the international community'. This trend, however, has not been accompanied by either a codification, or an emergence of a customary practice, of how to ensure compliance with these humanitarian standards. Describing this 'hypocrisy' in international law Guilcherd notes, 'Despite the now recognised right of victims to assistance, it is not possible to derive a right of states to bring this assistance by all means, including force' (1999; 23). The ICISS note, '...if the Security Council fails to discharge its responsibility in conscience-shocking situations crying out for action, then it is unreasonable to expect that concerned states will rule out other means and forms of action to meet the gravity

and urgency of these situations' (2000; 55). At its Fiftieth Anniversary NATO announced, 'Even though all NATO member states undoubtedly would prefer to act with such mandates [from the Security Council] they must not limit themselves to acting only when such a mandate can be agreed' (Caplan, 2000; 31). This, therefore, signals an emerging commitment to acting outside the UN which increases the likelihood of unilateral, and necessarily subjective, determinations of when to intervene for the protection of human rights. The ICISS warns, '...such interventions will not be conducted for the right reasons or with the right commitment to the necessary precautionary principles' (2000; 55). Therefore, an acceptance that certain grave violations of human rights are never permissible demands a clarified means by which these violations can be halted and the perpetrators punished and thus a codification of a right of intervention. To attempt to forge a new age of enforcement outside of existing international law is to potentially facilitate spurious humanitarian interventions and signal the breakdown of international law specifically as it relates to state sovereignty.

## **POTENTIAL AMENDMENT**

The current corpus of international law, while committed to outlawing the use of force in international relations, does permit its use in certain circumstances. These acceptable grounds for the use of force, self-defence and when there is a threat to international peace and stability, are reactive and premised on they're being the option of last resort. In both circumstances the primacy of the UN is retained. Therefore, codification of a right of intervention as a last resort, under the control of the UN, would not be a provision wholly out of step with existing provisions relating to the use of force. An amendment to the current charter could take the form of detailing the procedure when intra-state violations of human rights are of a sufficiently grave nature as to necessitate international concern.

The precise definition of those violations of human rights that would necessitate an international response is a contentious issue. Superlatives articulated in an attempt to clarify the circumstances under which intervention should take place are ultimately unhelpful and do not guard against the potential for abuse through lack of clarity. Terminology such as 'serious', 'grave', 'large', 'massive' and 'terrible' are of little use in the attempt to legally clarify when to intervene. These terms are inherently vague and thus open to manipulation.

Article 5 of The Rome Statute of the International Criminal Court (ICC) states, 'The Court has jurisdiction in accordance with this Statute with respect to the following crimes: (a) The crime of genocide (b) Crimes against humanity (c) War crimes (d) Crimes of aggression'. The Preamble of the ICC details it's commitment to working in tandem with the UN and determines that it is concerned only with crimes '...of concern to the international community as a whole'. Thus, there is an explicit commitment to the notion of internal sovereignty, as outlined in the UN, with the proviso that certain acts are the concern of the international community. These acts are then clearly defined in Part II of the Statute. The ICC's definition of its jurisdiction could be made applicable to a definition of the circumstances that would trigger international involvement and possibly humanitarian intervention. The occurrence of these crimes would need to be verified by an international organisation, such as the UN, rather than a regional organisation, NGO or media source. While these sources may alert the international body to the occurrence of these crimes, they

lack the legitimacy of an international organisation. Verification of the existence of these crimes would be crucial and, given the experience in Kosovo, contentious.

One necessary addition to the four situations outlined by the ICC would be when a state, either by design or incompetence, cannot cope with a humanitarian disaster, yet refuses to ask for assistance. For example, if it has been independently verified that a famine is ravaging the citizens of a state and the state cannot, or will not act, then intervention to alleviate the suffering would be justified. Indeed, General Assembly Resolution 43/131, while reaffirming the commitment to sovereignty, established the right of victims of humanitarian disasters to international emergency relief.

Upon the acceptance that a crime of the nature described by the ICC, is taking place, the international community, through the auspices of the UN, would have the right to become involved. The aim, under these circumstances, should be to stop the perpetrators committing the serious crime and not to engineer a certain political outcome. In keeping with present UN practice, the manner in which the crimes are stopped should initially take the form of diplomacy and non-violence. If there is no willingness on the part of the perpetrators to cease their activity and all diplomatic channels have been exhausted, as verified by the international body, then more coercive means would be legitimate. Given the nature of the crimes under consideration, it may not be practicable, though not necessarily so, to engage in sanctions or other forms of non-violent coercion, though the merits of sanctions themselves are questionable (Pape, 1997). If it were determined that there were no alternative to intervention then the use of force to halt the prosecution of certain serious crimes, as defined above, would be legitimate.

Humanitarian intervention would thus become a codified and clear element in international relations rather than being the contentious legal grey area it is at present. The determination of when to intervene would rest with the UN rather than any regional coalition or single state. Enshrining a right to intervene in the Charter, using the existing template for the use of force, in self-defence and under conditions of a threat to international peace and security, would prevent the abuse of the concept of humanitarian intervention. Justifying the use of force outside the control of the UN on the grounds that the UN lacked the legal mechanisms to deal with a matter of immediate humanitarian concern, as was suggested by NATO supporters during Operation Allied Force, would no longer be tenable except on the grounds of the illegitimate use of the veto.

## **CONCLUSION: NAÏVE UNIPOLARITY**

Opposition to codification, borne out of certain Western statesmen's belief in their right to prosecute their foreign policy as they see fit and their 'duty' to uphold 'universal' human rights, is a consequence of the current structure of the international political system. As Mastanduno writes, 'Only the United States excels in military power and preparedness, economic and technological capacity, size of population and territory, resource endowment, political stability, and 'soft power' attributes such as ideology. All other would-be great powers are limited or lopsided... Thus many commentators and theorists have concluded that the current structure is unipolar' (1999; 41). The unrivalled military and economic power of the United States enables it to act without the same restraint that an international actor would observe in a bipolar or multi-polar international system. The result, as Johnston argues, is that,

‘...in the decade following the end of the Cold War, the United States largely abandoned a reliance on diplomacy, economic aid, international law, and multilateral institutions in carrying out its foreign policies and resorted much of the time to bluster, military force, and financial manipulation’ (2000; 217).

The existence of legal vacuums, such as that regarding when and where to intervene for humanitarian purposes, present an opportunity, within the context of unipolarity, for the formulation of sectional norms and rules. In the context of the use of force for humanitarian purposes, the lack of definite legal guidelines can be, and some argue has been (Chandler; 2000), exploited by great powers allied to the hegemon, who have decreed that they have the moral authority to determine when to act.

The history and contemporary status of humanitarian intervention suggests that without establishing a legal definition, humanitarian interventions will continue to occupy a contentious place in international relations. The incompatibility of the codified rights of the individual and the legal status of the sovereign state, and the general acceptance that intervention for the purpose of stopping grave violations of human rights is permissible under certain circumstances, has created a void within contemporary international relations. Justice, in terms of the halting of human rights violations, is being prevented both by the existing legal order, through the inviolable sovereignty of the state, and the lack of legal order, in terms of the dearth of codified means by states can intervene to prevent human rights violations. The current unipolar international order is unsuitable to the preservation of justice in respect of humanitarian intervention, as intervention will be determined by the status of states *vis a vis* their relationship to the hegemon. The end of bi-polarity removed the ‘spheres of influence’ and ‘domino theory’ policy platforms from Western foreign affairs and thus these variables that acted as constraints on intervention, but also as compulsions to intervene, disappeared. As Mastanduno writes, ‘In the unipolar structure the international constraints have been lifted, and, in the absence of clear signals from the international structure, intervention policy... [has] become more haphazard and episodic’ (1999; 144). Therefore, for human rights to be upheld, under the current conditions of unipolarity and the lack of clear legal guidelines, justice, that is laws and means of enforcement, should take precedence over order, as the current order is asymmetrical and based on the hegemon’s unrivalled primacy, rather than on any generally accepted rules regarding state behaviour in this area.

The fallibilities inherent in adopting a means to intervene on the basis of an *ad hoc* assessment of individual cases determined by the sectional motives of the hegemon, and the fact that violations of human rights, universally recognised as unacceptable, will continue to receive international attention, argues strongly for the clarification of humanitarian intervention in international law.

Within the unipolar system, there is an obvious danger that the hegemon will determine that it is not only capable of deciding what is permissible, but also that it has the moral authority and duty to do so. In February 1998 US Secretary of State Madeline Albright defended the use of force against Iraq on the grounds that the US was battling tyranny and upholding standards of international law and morality. Addressing the opposition voiced against this use of force she declared, ‘If we have to use force, it is because we are America. We are the indispensable nation. We stand tall. We see farther into the future’ (Johnston, 2000; 217). Thus, a product of the asymmetrical international system is the hegemon’s conviction that’s its position imbues it with moral as well as political, economic and military power. This sense of indispensability and moral clarity directly impacts on the manner in which the

hegemon perceives it's duty and/or right to intervene. According to Condoleezza Rice 'American values are universal' (2000, 49) and in defence of the intervention in Iraq President Bush asserted he was 'forced to act' to 'liberate' the Iraqi people because the US is willing to 'accept the burden of leadership' (Borger, 2003: 1). Statements such as these indicate that elements within the US political hierarchy are not only willing to act on their sense of what is right and wrong, but also that they believe that 'American' conceptions of morality are universal, therefore, opposition to these moral principles is borne out of immorality or intellectual short-sightedness rather than any genuine cultural or ideological plurality; hence the good versus evil, 'with us or against us' rhetoric of the Bush administration. As noted by Johnson, 'A classic mistake of empire managers is to come to believe that there is nowhere within their domain...in which their presence is not crucial. Sooner or later, it becomes psychologically impossible not to insist on involvement everywhere, which is, of course, a definition of imperial over-extension' (2000; 221). Under the conditions of unipolarity, therefore, the hegemon will at times seek to intervene when it is not warranted or solicited because of both its status within the system and the ideological convictions this position imbues it with.

The primacy of the hegemon is increased by the need for lesser, but regionally major, powers, such as the UK and Japan in this instance, to support the hegemon's global strategy. Thus, a decision by the hegemon to intervene may appear to have wider support because dependant powers will support it for geopolitical reasons rather than out of conviction. As Mastanduno writes,

'Multilateral decision-making processes help the United States to exercise its dominant power with legitimacy. They are key instruments of states craft – indeed of realpolitik – for a dominant state that is seeking, in a unipolar setting, to convince other states to cooperate with it rather than to balance against it' (1999; 157).

In light of this, to avoid partisan conceptions of what is legitimate and what is moral, which will always favour the hegemon in conditions of unipolarity, a legal codification of international relations norms is necessary. While there is no guarantee that a hegemon will observe the law, legal codification will guard against the emergence of customary international law on the basis of sectional hegemonic state practice. International laws do not simply emerge from within a unipolar system without some concessions to the structure. Thus, it would be naïve to believe that a law could be ratified without having the consent of the hegemon and its supporters and thus be consistent with the hegemon's global strategy. However, the gulf between what is the right thing to do and what is likely to happen is not of primary importance. If it can be asserted that codification is the best way to regulate intervention then the fact that this regulation is unlikely to happen under the prevailing international systemic conditions does not, of itself, negate the validity of the need for codification, rather it merely underlines the inherent asymmetry of the system.

International law is, according to Russett and Starr, '...merely a magnifying mirror that faithfully and cruelly reflects the realities of world politics' (1995; 301). The existence of laws does not prevent unipolar bullying whereby the hegemon determines the order that prevails. As evidenced by the impotence of the UN and the ICJ in the face of the bi-polar system during the Cold War and, albeit possibly to a lesser degree, the unipolar system after, the status of states determines their adherence to international law. As the DIIA notes, 'States are attracted to international law by the expectation that it will further their interests' (1999; 20). Therefore, the twin goals of codifying humanitarian intervention in international law, that of preventing the



violation of certain human rights and preventing unwarranted external interference in sovereign states, is ultimately constrained by the current conditions of unipolarity. However, as Starr asserts, ‘...obedience to international law or the self constraint of states is based on the basic principle of reciprocity and precedent...International law is based on a ‘golden rule’ principle – rule-based behaviour to others will beget rule-based behaviour, whereas defection or non compliance will beget non compliance’(2002; 301). The abandonment of the hegemon’s adherence to the norms and laws of international relations will be reciprocated throughout the system inevitably destabilising it and ultimately impinging on the hegemon’s security.

As noted by Layne (1993) expansive unilateralism executed by the hegemon during the period of unipolarity will necessarily increase the likelihood of the hegemon’s decline by precipitating the rise of opposing coalitions determined to subvert the unipolar structure. Thus, exploiting the lack of legal guidelines, and ignoring those that do exist, will have negative consequences for the perpetrator. Western attempts to dominate the growing dispensation towards protecting human rights through the forcible imposition of its subjective moral agenda will inevitably encounter opposition from rival, though currently lesser, powers, increase the likelihood of the escalation imperative among secessionists, and encourage the diminution of sovereignty and the recourse to sub state and tran-state terrorist groups. There is thus a need for the realisation amongst advocates of unregulated expansive Western interventionism that while there is no immediate need, or coercive compulsion, to obey or create international law regarding humanitarian intervention, the consequences of not doing so will necessarily impact on Western state security. As Guilcherd notes, ‘Unless intervention is regulated by a strict checklist of criteria ...one risks enhancing the danger of confrontation between power blocks and increasing world anarchy’ (1999; 25). Therefore, Western humanitarian intervention *per se* is not inherently destabilising; unilateralism and disregarding international law is.

## REFERENCES

- Arend, Anthony & Beck, Robert (1993) *International Law and the Use of Force*, London: Routledge
- Bloom, William (1990) *Personal Identity, National Identity and International Relations*, Cambridge: Cambridge University Press
- Borger, Julian (2003) 'Bush Rallies Troops for War', *The Guardian*, 4<sup>th</sup> January, p. 4
- Broder, John (1999) 'Conflict in the Balkans', *New York Times*, March 25, p. A15
- Bull, Hedley (1977) *The Anarchical Society: A Study of Order in World Politics*, London: Macmillan
- Cassese, Antonio (1999), 'Ex iniuria ius oritur: Are We Moving Towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?', *European Journal of International Law*, 10(1), pp. 23-31
- Caplan, Richard (2000) 'Humanitarian Intervention: Which Way Forward?', *Ethics and International Affairs*, 14, pp. 23-38
- Chandler, David (2000) 'International Justice', *New Left Review*, vol. 6, Nov/Dec, pp. 55-66
- Cooper, Robert, (2002) 'The New Liberal Imperialism', *The Observer*, April 7, p. 13
- Czempiel, Ernst-Otto, Interdependence and Intervention, in Aleksandar Jokic & Burleigh Wilkins (2004) *Lessons of Kosovo*, Toronto: Broadview Press
- Danish Institute of International Affairs (1999) *Humanitarian Intervention*, Copenhagen: Danish Institute of International Affairs
- Feste, Karen (2003) *Intervention: Shaping the Global Order*, Praeger: Westport
- Glennon, Michael (1999) 'The New Interventionism', *Foreign Affairs*, 78(3), pp. 2-7
- Gow, James (2003) *The Serbian Project and its Adversaries: A Strategy of War Crimes*, McGill-Queens University Press: Montreal
- Guicherd, Catherine (1999) 'International Law and the War in Kosovo', *Survival*, 41/2, p. 19-34
- Hertz, John (1957) 'Rise and Demise of the Territorial State', *World Politics*, 9, 473-493
- Hodge, Carl (2000) 'Casual War: NATO's Intervention in Kosovo', *Ethics and International Affairs*, 14, pp. 39-54
- Holbrook, Jon (2002) 'Humanitarian Intervention', in David Chandler (ed.), *Rethinking Human Rights*, Hampshire: Palgrave Macmillan, pp.138-146
- Ignatieff, Michael, (2000) *Virtual War: Kosovo and Beyond*, New York: Picador
- Independent International Commission on Kosovo (2000) *Kosovo Report*, Oxford: Oxford University Press
- International Commission on Intervention and State Sovereignty (2001) *The Responsibility to Protect*, Ottawa: International Development Research Centre
- Johnston, Chalmers (2000) *Blowback*, London: Little Brown & Company
- Kedourie, Elie (1971) *Nationalism*, London: Hutchinson University Library
- Kuperman, Alan, (2003) 'Transnational Causes of Genocide', in Thomas, Raju, (ed.) *Yugoslavia Unravelling: Sovereignty, Self Determination, Intervention*, Oxford: Lexington Books
- Layne, Christopher (1993) 'The Unipolar Illusion: Why New Great Powers Will Rise', *International Security*, 17(4), pp. 5-51
- Lillich, Richard (1967) 'Forcible Self-Help by States to Protect Human Rights', *Iowa Law Review*, 53, pp. 325-345

- Lloyd, John, (1999) 'A Rich and Comfortable War', *The New Statesman*, June 14, pp??
- Mastanduno, Michael (1999) 'Preserving the Unipolar Moment', in Kapstein, Ethan & Mastanduno, Michael, (eds.) *Unipolar Politics: Realism and State Strategies After the Cold War*, New York: Columbia University Press
- Pangle, Thomas & Ahrensorf, Peter (1999) *Justice Among Nations*, Kansas: University Press of Kansas
- Pape, Robert (1997) 'Why Economic Sanctions do not Work', *International Security*, 22(2), 90-136.
- Rice, Condoleezza (2000) 'Promoting the National Interest', *Foreign Affairs*, Vol. 79(1), pp. 5-10
- Robertson, Geoffrey (2002) *Crimes Against Humanity*, London: Penguin
- Russett, Bruce, Starr, Harvey & Kinsella, David (2000) *World Politics: The Menu for Choice*, Bedford/St Martins; New York
- Solano, Javier, (1999) 'NATO Press Release 041', 24 March
- Starr, Harvey (1995) 'International law and International Order', in Kegley, Charles (ed.) *Controversies in International Relations Theory*, New York: Saint Martins Press
- Unites States National Security Strategy (2002), Available online, <http://www.whitehouse.gov/nsc/nss.html> [Accessed September 2005]
- Thomas Weiss & Jarat Chopra, (1995) 'Sovereignty Under Siege', in, Lyons, Gene & Mastanduno, Michael (eds.) *Beyond Westphalia: State Sovereignty and International Intervention*, Johns Hopkins University Press: Baltimore